Case No.: 19-35428

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JENNIFER JOY FREYD,
Plaintiff-Appellant,

v.

UNIVERSITY OF OREGON; et al.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON, EUGENE
(CV. 6:17-cv-448-MC)

Plaintiff-Appellant Freyd's Reply Brief

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INTRODUCTION

The overriding question in Plaintiff's Equal Pay Act (EPA) claim is whether, when comparing independent professionals, the very fact that they exercise autonomy and have some degree of control over how they meet the expectations of the job means that they can no longer claim the protection of equal pay laws. That cannot be what Congress intended in enacting the broad, remedial law. Accordingly, courts around the country assessing EPA claims between university faculty find that jobs of professors in the same department at the same rank are substantially equal.

Defendants' criticisms of Plaintiff's statistical evidence fail to overcome the showing that UO's retention raise practices in its Psychology Department have a disparate impact on women. At most, they raise questions of fact on the probative value of the statistics, whether the challenged practice is job-related, and the viability of an alternative practice, all of which require a jury trial. Likewise, Defendants cannot overcome record evidence giving rise to an inference of intentional discrimination by pulling other evidence out of context to rebut the inference. It is the job of a jury to weigh any such conflicting inferences.

The lower court erred in taking those questions away from a jury.

I. In Assessing Substantially Equal Work Under the Equal Pay Act, It Is The Job Duties That Matter, Not How Each Individual Fulfills Them.

Under the EPA, "the prima facie case is limited to a comparison of the jobs in question, and does not involve a comparison of the individuals who hold the jobs." *Stanley v. Univ. of S. California*, 178 F.3d 1069, 1074 (9th Cir. 1999); *Hein v. Oregon College of Educ*., 718 F.2d 910, 914 (9th Cir. 1983). In a professional setting, this involves analysis of the skills, effort and responsibilities that the employer demands for the position, not a granular-level look at the particular way each comparator meets those requirements. *See e.g., Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 593-95 (11th Cir. 1994) (finding substantial equivalence among corporate Vice Presidents responsible for different departments). The lower court and Defendants err in comparing how each individual performs the job, rather than the job itself.

A jury could find that Freyd holds the same job as her four comparators because all meet the skills and education necessary for the position; UO requires all to perform the same job duties demanding equivalent degrees of effort; and UO evaluates all under the same criteria for purposes of determining salary.

The position's common core of tasks includes high quality research and publications in peer-reviewed journals in the field; teaching undergraduate and graduate level Psychology courses and mentoring individual students; and service to the department, university and profession. ER-112; 159-62. Defendants point to

additional responsibilities that individuals have taken on to show differences. But added duties that are separately compensated, are not required of the job, or are not recognized by the University in setting base pay, do not render the underlying jobs dissimilar. *See Spaulding v. University of Washington*, 740 F.2d 686, 698 (9th Cir. 1984) (holding that faculty activities such as interdisciplinary teaching, research, and community activities that were "not job required" were not relevant to question of substantial equality); 29 C.F.R. § 1620.14(a)(where differences are not recognized as relevant for wage purposes, they may be too insubstantial to defeat substantial equality).

UO mischaracterizes Plaintiff as arguing that all faculty are different and yet that they are all the same. Plaintiff's comparison group is limited to those in the same department at the same rank. Faculty positions in different departments require different skills, education, and training. Promotion to higher ranks requires a higher level of experience and ability. Such variations in skill signify unequal work for purposes of the EPA. *See, e.g., Allender v. Univ. of Portland*, 689 F. Supp. 2d 1279, 1285 (D. Or. 2010) (finding full professor not substantially equal to associate); *Spaulding*, 740 F.2d at 697-98 (finding unequal work because different academic departments have different education and training).

Within the cadre of professors in the same department at the same rank, it is a common job duty that each individual pursue a unique research agenda and make

their own distinctive mark on the field. The fact that each of the comparators excels in meeting that shared expectation does not render their underlying jobs unequal for purposes of equal pay. *See, e.g. E.E.O.C. v. Univ. of Miami*, Civ. No. 19-23131, 2019 WL 6497888 at *2-3 (S.D. Fla., Dec. 3, 2019) (denying motion to dismiss because allegations that professors' duties included teaching classes and publishing; that they were reviewed based on the same criteria; and that they were promoted to the same level in the same department alleged equal work).

UO points to *Penk v. Or. State Bd. of Higher Educ*., No. 80-436 FR, 1985 U.S. Dist. LEXIS 22624 at *104 (D. Or. Feb. 13, 1985) as a case that compares two faculty in the same department at the same rank for equal pay purposes.[1] *Penk*, however, does not support Defendants. Dr. Anna Penk was an associate professor of Mathematics in the section of Natural Sciences and Math at Western Oregon State College. *Id*. at *81. She named four comparators: three full professors in the same section, and Dr. Wright. *Id*. at *91, 96. The court found Penk's position substantially equivalent to that of the three full professors. *Id*. As to Wright,

[1] Strangely, the Westlaw version of the February 13, 1985 order in *Penk* omits the lengthy discussion of individual claims that the LEXIS version contains. *Compare Penk v. Or. State Bd. Of Higher Educ*., No. 80-436 FR, 1985 U.S. Dist. LEXIS 22624 (D. Or. Feb. 13, 1985) *with Penk v. Or. State Bd. Of Higher Educ*., No. 80-436 FR, 1985 WL 25631 (D. Or. Feb. 13, 1985). Because Plaintiff initially reviewed the Westlaw version, she concluded that the case made no such comparison.

however, the court did not determine whether he was a tenured professor at any rank, whether he taught any courses, or whether he was housed in the math department. Wright was hired to organize and administer the college's fledgling computer science offerings, which the court found was not substantially equivalent to being a math professor. Contrary to UO's claims, the decision does not stand for the proposition that two professors in the same department at the same level can have unequal jobs.

A. Duties That Are Paid Separately Do Not Show That Work Compensated By the Base Salary Is Unequal.

UO compensates many of the duties it identifies as areas of difference among the comparators separately from the base salary that each receives for being a full professor of Psychology. ER-163 ("overload assignments"). The base salary pays for the basic job duties expected of a full professor, and that is the comparison that Freyd makes. *Melanson v. Rantoul*, 536 F. Supp. 271 (D.R.I. 1982) addresses precisely this circumstance. In *Melanson*, an associate professor in the Freshman Foundation department brought an EPA claim against the Rhode Island School of Design. While her work was substantially equivalent to that of other associate professors in the Freshman Foundation, two of them, Udvardy and Hobbs, also served as department heads. *Id*. at 287-89. Udvardy received a separate stipend for his department head duties. The court explained:

> While this represents a difference in responsibility between him and the plaintiff, the record clearly shows that for the years 1973-74 through 1976-77, he received a separate and identifiable stipend for his Chairman's duties, above and beyond his faculty base salary. On this basis, therefore, this base salaries for those years, exclusive of the stipend, can be compared.

Melanson v. Rantoul, 536 F. Supp. 271, 289 (D.R.I. 1982). Hobbs, however, did not receive a separate stipend, and without the separate compensation, his base salary could not be compared with the plaintiff's. *Id*. at 288-89.[2]

This same analysis applies to Freyd's comparators. Mayr is paid through a separate stipend and course releases for his service as department head. ER-442, 449, 457. His base pay compensates for his continuing duties as a professor within the department. Mayr himself made the distinction: "I get a stipend [for department head duties], but if you remove that then there is just my salary." ER-471.

Similarly, Hall was paid separately both for his work with CoDaC and for his service as Director of Clinical Training (DCT), while his pro-rated base salary paid for his work as a psychology professor. ER-429, 434, 436, 444. UO accounted for his CoDaC role separately and paid it separately, just as he received a separate stipend for serving as DCT. *Id*.; *see also* ER-400, 408, 414, 423 (showing Hall at

[2] Defendants' attempt to distinguish *Melanson* sidesteps this holding on separate compensation and instead focuses on a different comparator, Professor Sgouras. Sgouras was Chairman the entire Division of Design, which was not substantially equivalent to a professor in one department. *Id*. at 287.

.75 FTE in Psychology). The roles should be treated separately when comparing duties and pay rates with Freyd. Just as in *Melanson*, Hall's base salary as a psychology professor, not the additional monies he received for other duties, should be compared with Freyd's duties and salary. *See also Russell v. Placeware, Inc*., No. 03-836-MO, 2004 WL 2359971 at *11 (D. Or. Oct. 15, 2004) (comparing duties and base pay rate of part-time employee with those of full-time employee).

Fisher, as well, is compensated in a stipend on top of his base pay for his work in prevention science. ER-444, 451, 459. Both Fisher and Allen receive separate, additional pay for grant-related duties that they fulfill in the summers. ER-444, 453, 223-24. In short, many of the duties that UO points to in arguing that the jobs are not substantially equal are not compensated through the base salary. ER-82. The core set of duties that the base salary pays for remain substantially equal for all comparators.

B. Freyd's Evidence of the Skills, Effort and Responsibility In Her Work Supports a Jury Verdict of Substantially Equal Jobs.

Defendants complain that Freyd did not present enough evidence of the minutiae of her job for an adequate comparison. Yet Freyd presented evidence of the specific work she performs, including the required skills, effort and responsibility, that was more than sufficient to support a jury determination in her favor. *See generally* ER-231-43; FER-14-72.

Two of the comparators run centers or labs for their research just as Freyd does. Mayr explained, "you give something a name and then you have maybe a little bit of an operating budget, and you call it a center. You know, in principle almost anybody could say I have a center now." FER-2. For all of them, the centers/labs involve supervising administrative staff, graduate students and post-doctoral fellows; securing funding and adhering to conditions placed by funders; overseeing the research and publications; and handling budgets and other administrative tasks. ER-232-33, 283-84, 299. Allen, Mayr, Hall and Freyd all serve as journal editors, consulting editors or on editorial boards. SER-79; ER-234-35. They all have taken on important service work for the department and the university in the form of committee work, administrative work, formulation of policy or service as an elected representative. SER-235, 132-33; ER-461, 82, 236-37. While the specifics of this service component may change over time for each individual, it retains the same character and is similarly effortful. ER-223, 112.

To the extent that the details vary in the specifics of how each individual carries out these common job duties, it is a question for a jury whether those variations render the positions substantially unequal. *Lavin-McEleney v. Marist Coll.,* 239 F.3d 476, 480 (2d Cir. 2001). UO argues, for example, that Freyd did not address the differences between responsibilities imposed by a federal grant versus responsibilities imposed by a private funding. Yet importantly, the job does

not require Psychology professors to secure any outside funding – the job responsibility is to do high quality research. ER-159; 238-39. The funding is merely a means to an end, and some professors like Freyd can do their research without grant funding. *Id*.; ER-225. A jury could easily decide that the fact that Freyd and her comparators all seek external funding to enable their research, and adhere to funding requirements, is more a factor of similarity than of difference. Likewise, it is a reasonable inference that Freyd has the same level of responsibility for supervising her staff, ensuring legal compliance, fulfilling reporting requirements, and overseeing ethical and legal obligations as her colleagues have.

UO argues that federal grant recipients have additional responsibility because failure to fulfill federal grant duties could result in loss of federal funding to the university as a whole. But UO does not recognize the responsibilities of managing a federal grant "as a significant factor in determining wage rates," rendering the responsibilities imposed by the grant "insufficient to justify" a determination of unequal work. 29 C.F.R. § 1620.17(b)(3); ER-68.

Nor are the penalties in practice so different from what Freyd faces. Penalties are "usually directed at individual investigators" (SER-255), and regulations make clear that in the event of non-compliance, the first step is to impose more conditions on the grant. 45 C.F.R. § 75.371. Freyd also has to report

and meet conditions in managing private grants to her lab. ER-232-33, 239. A jury could conclude that the jobs are substantially equal.

UO concedes that Hall has not held any post outside the Psychology Department (or served as DCT) since the spring of 2017. Ans. Br. at 27. He has remained a full professor of psychology at 1.0 FTE since then. ER-455; SER-101. UO makes the argument (newly on appeal) that Hall does not do substantially equal work because Freyd participated in a prestigious fellowship at Stanford in 2018-19. This argument ignores the year and a half between Spring 2017 and Fall 2018 when they both were in Eugene doing the same job. ER-455. UO continues to pay Freyd as a full professor and admits that she is fulfilling the job duties of a full professor. FER-3. There is no basis to distinguish Hall from Freyd since he stepped down from CoDaC.[3]

UO says that plaintiff's reliance on EEOC regulations is a new argument, though it also concedes that she referenced them below. Discussing the regulations in more detail on appeal hardly presents a "new theory" that the district court had no opportunity to consider.

Finally, UO asserts without explanation that Freyd's claims "were largely untimely," though it has not argued that any claims are subject to dismissal for this

[3] UO also points to a retirement-based raise that Hall received when he announced his intent to retire. While this might be relevant to a defense, the reason for Hall's 2017 raise is not relevant to whether their jobs are substantially equal.

reason. The argument seems to refer only to the time period for which she might recover damages. Though Freyd disagreed with some of UO's positions, the question is not relevant to any issue on appeal. ECF 68 at 53.

II. Freyd's Claim Under ORS 652.220 Should Be Decided Under the Law As It Exists Today, And It Differs from Federal Law.

UO's argument that Freyd has no claim under the amended version of ORS 652.220, which went into effect January 1, 2019, ignores long-standing law. "The normal rule in a civil case is that we judge it in accordance with the law as it exists at the time of our decision." *Tully v. Mobil Oil Corp.*, 455 U.S. 245, 247 (1982); *see also* Wright & Miller, "Superseding Legislative Action," 13C Fed. Prac. & Proc. Juris § 3533.6 (3d ed.) (same). The fact that amendments to ORS 652.220 went into effect while this case was pending does not require Freyd to plead a new claim. It is the Court's duty to decide her claim under the law as it exists today, which is the amended version of the law. Freyd is still working at UO and her claim seeks prospective relief as well as back pay; she is not asking for retroactive application of the new law. Moreover, the change in the law was clearly presented to the district court at oral argument and noted by the judge, who responded,

"Okay. I will take a look at that." SER-15. That is plenty of notice for the judge to take the amendment into account in his ruling.[4]

Cases uniformly hold that Oregon's standard under ORS 652.220 – "work of comparable character" -- is not the same as the federal standard of "equal work." It is broader. *See Smith v. Bull Run Sch. Dist. No. 45*, 80 Or. App. 226, 229 (1986) ("One difference between them is that the federal act refers to 'equal' work, whereas the state act refers to 'comparable' work, which is a more inclusive term."); *Bureau of Labor & Indus. v. City of Roseburg*, 75 Or. App. 306, 309 n. 2 (1985) ("work of 'comparable character' is broader than 'equal work'").

Defendants attempt to lump claims under ORS 652.220 together with those under Chapter 659A (formerly ORS 659), as if they were all subject to the same analysis. They are not. The cases UO cites only support the proposition that claims under ORS 659A generally track analogous federal statutes. *See Snead v. Metro. Prop. & Cas. Ins. Co*., 237 F.3d 1080, 1087 (9th Cir. 2001) (holding that Oregon interprets its disability discrimination laws in conformity with the ADA); *Henderson v. Jantzen Inc.*, 79 Or. App. 654, 657 (1986) (limiting its holding to claims under ORS 659). Cases decided under ORS 652.220, by contrast, stress

[4] Even if counsel had not notified the judge of the amendments, the court would still be bound to decide the claim under the law as it existed at the time of decision. *See Fusari v. Steinberg*, 419 U.S. 379, 387 n. 12 (1975).

that the "comparable character" language of ORS 652.220 is broader than the federal "equal work." *See Smith, supra; Bureau of Labor, supra*.

Justice Rehnquist, in dissent in *Washington County v. Gunther*, 452 U.S. 161, 184-87 (1981) explains the substantial difference between "work of comparable character" and "equal work." He details legislative debates addressing which standard to use in the federal EPA. He quotes legislators remarking, "There is a great difference between the word 'comparable' and the word 'equal'" and "*The word 'comparable' opens up great vistas*." *Id.* at 186 (emphasis in original). "They observed that the 'equal work' standard was narrower than the existing 'equal pay for comparable work' language," and they chose equal work. *Id*. "The congressional debate on that legislation leaves no doubt that Congress clearly rejected the entire notion of 'comparable work.'" *Id*. *See also Brennan v. City Stores, Inc.*, 479 F.2d 235, 238 (5th Cir. 1973) ("the standard of equality is clearly higher than mere comparability yet lower than absolute identity").

Defendants' argument that Oregon's 'comparable character' language is the same as 'equal work' under federal law has no support in the law or history of equal pay debates. Oregon's recent amendments strengthening its law show its continued fidelity to "the entire notion of 'comparable work,'" and its intent to extend its protections more broadly than the federal law.

III. Both Plaintiff's And Defendants' Evidence Shows that the Department's Retention Practices Have an Unjustified, Disparate Impact on Women.

A. Plaintiff's Expert Statistical Analysis Meets Plaintiff's Prima Facie Case.

1. The District Court's Decision on Dr. Cahill's Analysis Should Be Reviewed De Novo.

Defendants argue that the district court's decision to reject Plaintiff's statistical evidence should be considered under the clearly erroneous standard. The clearly erroneous standard would apply if the district court had ruled that Plaintiff's evidence was inadmissible or that her expert could not testify after a *Daubert* motion, but the district court did neither. Instead, the court admitted the declaration and then assumed the role of factfinder to discredit the expert's findings, rather than crediting the non-movant's evidence and taking all inferences in her favor, as it should have.

The cases that UO relies on involve determinations by district courts that expert evidence was inadmissible. *See General Elec. Co. v. Joiner*, 522 U.S. 136, 140 (1997); *Orr v. Bank of Am.*, 285 F.3d 764, 772-73 (9th Cir. 2002); *Wong v. Regents of Univ. of Cal.*, 410 F.3d 1052, 1059 (9th Cir. 2005); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 583-84 (1993); *Daubert v. Merrell Dow Pharm.*, 43 F.3d 1311, 1315 (9th Cir. 1995). Here, the court did not rule that Cahill's testimony was inadmissible. UO made no *Daubert* motion, and it never raised either *Daubert* or Fed. R. Evid. 702 at any point below. ECF 79 at 15-17; ER-33-

41. Rather than making an evidentiary ruling, the judge decided whether Plaintiff's admissible evidence met her burden on summary judgment. ER-18-19. That decision is reviewed *de novo*. *See City of Pomona v. SQM North America Corp.,* 750 F.3d 1036, 1043 (9th Cir. 2014).

In considering Cahill's testimony, the procedural posture of the case is also critical. Under the governing scheduling order, expert disclosure and reports were not due until after summary judgment, and expert discovery had not commenced. ECF 48. Cahill's declaration was not an expert report, and UO's complaints that it lacks various indicia of an expert report are misplaced.

2. UO's Criticisms of Cahill's Analysis Fail to Rebut Plaintiff's Showing of Disparate Impact.

UO did not rebut Cahill's statistical conclusions. To the contrary, Defendant Sadofsky admitted that UO's retention practices had a disparate impact on the salaries of female full professors, and the Department's analyses confirm it. ER-104, 130, 146, 118. UO's declaration from Dr. Ringold did not offer any different conclusions from those that Cahill and Defendants themselves had reached. ER-33-41. It did not argue that the data set was too small or show how adding different variables would have changed the outcome of the analysis. *Id*. This Court has long held "that the defendant cannot rebut an inference of discrimination by merely pointing to flaws in the plaintiff's statistics." *E.E.O.C. v. General Telephone Co. of Northwest, Inc*., 885 F.2d 575, 582-83 (9th Cir. 1989) (reversing district court's

rejection of plaintiff's statistical analysis because defendant failed to show that without the alleged flaws, statistical disparities would be eliminated); *Hemmings v. Tidyman's, Inc*., 285 F.3d 1174, 1188 (9th Cir. 2002)("defendant may not rest an attack on an 'unsubstantiated assertion of error.'"). Yet pointing to alleged flaws is all that Defendants offer here.

The alleged flaws misconstrue Cahill's analysis and ignore record evidence. They argue:

Dr. Cahill omitted "without explanation" three full professors, and up to 18 assistants and associates.

The explanation for omitting Tucker, Slovic and Espy appeared in the summary judgment brief: they did not serve as full professors of Psychology and were not paid on that department's salary scale (or at all). ECF 68 at 20; ER-85; SER-92. Cahill omitted professors at lower ranks because UO handles retention negotiations for them differently from how it handles retentions for full professors. FER-12-13, 1. Moreover, Mayr's repeated statistical analyses included all psychology professors and showed the same statistical anomalies. ER-104. Defendants cannot show that changing the comparison group would change the inference of discrimination, as they must to defeat Plaintiff's statistical evidence. *See General Telephone,* 885 F.2d at 582-83.

Cahill said he removed two professors though his chart shows three.

Cahill nowhere says he removed only two professors. His declaration names the three who appeared in department data but were not working as department professors and therefore were removed.

Cahill did not include Associate Professor Jennifer Pfeiffer.

In the time period that Cahill's analysis covered, Pfeiffer was not a full professor. Defendants' argument that she should have been selectively included in the analysis makes no sense (and was not raised below). Eliot Berkman, a male associate professor, also became a full professor in 2018, but UO does not argue that he should have been included in the analysis. That might be because Berkman received a higher retention raise than Pfeiffer did in 2018. ER-270. Again, UO cannot show that addressing these unfounded "flaws" would change the outcome of the analysis.

Cahill did not identify the data on which scatterplots rely.

The scatterplot at ER-248 specifies its sources by bates number and an identifier that UO itself used.

Cahill changed the base year.

Cahill's base year came from the data provided by the UO. UO itself changed the date it gave raises. UO makes the unsubstantiated claim that if Cahill used a different base year, Hall would fall below the regression line (which shows men's salaries only). They provide no analysis with a new regression line to reflect

the changed salary. Nor could they show that any such change would alter the underlying conclusion, which is that men earn substantially more than women in the department and the gap grows over time.

Cahill failed to describe his regression theory or the reasons for his choices.

Cahill described exactly what he did, and why, at paragraph 4 of his declaration. ER-245. This was not an expert report requiring full explanation of all conclusions, it was simply a statistical analysis. Moreover, this criticism fails to meet UO's burden of showing that any further description would change the results.

Cahill failed to explain why he included stipends.

Cahill did not include any stipends in his analysis; he included endowed chair funds. Plaintiff explained the reason below. ECF 68 at 19. Former Interim President Scott Coltrane, who was UO's designated 30(b)(6) witness on the topic of endowed chairs, explained that chair funds are "part of the base salary. . . . It's their permanent salary." FER-11. Thus, a comparison of base salaries should include endowed chair funds. Nor could UO show that omitting them would change the outcome of the statistical analysis.

UO points out that Helen Neville held the same endowed chair as Mayr. Unlike Mayr, however, Neville received no additional compensation for it. SER-80; ER-386, 394-95, 410, 417-18.

Cahill failed to record data properly.

Newly on appeal, UO complains that Cahill recorded 26 retention offers when there were only 25. Though Defendants count 25 dots in the scatterplot at ER-248, one of them, in the year 2014, is darker blue than the others and this represents two retention offers made to men at the same amount. The data is consistent with 26 retentions, 21 of them to men.[5] UO further claims that amounts of retentions were inaccurately recorded in 2017, but does not identify the discrepancies or their significance. Again, UO fails to meet its burden of showing that addressing any alleged inaccuracies would change the showing of disparate impact.

Cahill omits grant funding as a variable.

This criticism, again new on appeal, ignores UO's admission that securing grant funding does not entitle a professor to a raise. ER-68. Moreover, omission of particular variables is no basis to disregard plaintiff's statistics. *Bazemore v. Friday*, 478 U.S. 385, 400 (1986).

[5] UO seems to be arguing that there was no retention offer made to Gordon Hall in 2014, but Sadofsky testified that Hall received a raise and it is reflected on UO's chart of retentions. FER-2; ER-472. If there is a dispute on this point, it merely shows material disputes that should be left to a jury.

The data set is too small.

As addressed in Plaintiff's opening brief, Cahill's data set had 125 observations which included every working full professor in the department over a decade, a number that is sufficient to show statistical significance. Opening Br. at 45. All of UO's cases on this point can be distinguished. In *Cerrato v. S.F. Cmty Coll. Dist*., 26 F.3d 968, 976-77 (9th Cir. 1994), the district court rejected plaintiff's statistics when sitting as a factfinder after a full trial. One of the reasons was that the expert considered a small random sample rather than the entire eligible population. *Id.* at 977 n. 21. Not only did Cahill consider the entire population over time, but the district court here was not acting as a factfinder after trial. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 996-97 (1988) declined to define what constitutes a small data set, and leading statistics textbooks show that 125 observations is adequate. The remaining cases, *Shutt v. Sandoz Crop Prot. Corp*., 944 F.2d 1431, 1433 (9th Cir. 1991) *Sengupta v. Morrison-Knudsen*, 804 F.2d 1072 (9th Cir. 1986); *Morita v. S. Cal. Permanente Medical Grp*., 541 F.2d 217, 220 (9th Cir. 1976), and *Stout v. Potter,* 276 F.3d 1118, 1123 (9th Cir. 2002) involved far fewer observations than the 125 here and one-time events like a layoff or promotion decision, not multiple observations over time.

Without evidence that addressing these alleged flaws would change the outcome, none of these criticisms is a basis to disregard plaintiff's evidence of

disparate impact. *See General Telephone*, 885 F.2d at 581, *Bazemore*, 478 U.S. at 400-01. At most, they raise a question for the jury about the probative value of the analysis. *See Obrey v. Johnson*, 400 F.3d 691, 695 (9th Cir. 2005) (holding that objections to evidence of statistical disparities should be addressed by rebuttal, not exclusion); *Mangold v. Cal. Pub. Utils. Comm'n,* 67 F.3d 1470, 1476 (9th Cir. 1995) (holding that objections to completeness of statistical evidence did not make it irrelevant to showing discrimination).

B. Plaintiff's Additional Evidence Also Shows Disparate Impact.

UO would have this Court disregard all of the other evidence that plaintiff offered showing disparate impact, but that would be error. *Bazemore*, 478 U.S. at 401 (noting that the Court of Appeals' failure to examine plaintiff's regression analyses in light of all the evidence in the record was error).

UO attacks admissions of its own department and witnesses that there is a pay gap between men and women by saying they do not show statistical significance. In fact, several internal analyses do show statistical significance. FER-6-10. UO goes on to say that Plaintiff did not properly compare selection rates in her 4/5 rule analysis, but selection rates are exactly what she compared: a success rate of 40% of retention negotiations for women, compared with 67% for men. Opening Br. at 10; ER-202-06, 472-75.

UO points to Mayr's observation that in one of his regression analyses, Neville's high salary changed the outcome. But Mayr went on to explain that, for exactly that reason, he conducted the same analysis over and over at different points in time. ER-103. In this way Mayr took into account retirements, resignations, promotions, new people joining the faculty, and raises over time. *Id*. It was only through this repeated analysis that Mayr reached a conclusion he felt was reliable: that "the numbers show" a gender differential in salaries in the department resulting from retention practices. ER-104. Mayr explained to the Deans that the differential "has been remarkably stable across recent years that included substantial changes in our faculty roster (e.g., Awh and Vogel's departure, Neville, Taylor retirement)." ER-146. "The only way to really truly account for these factors is [to] have time play a role in this analysis." ER-103.

UO criticizes Freyd's "personal scatterplots" for having too few variables. But Freyd never attempted to support her prima facie case with her personal observations. Even if she had, a mere claim that variables are missing is no basis to disregard the statistical evidence. *Bazemore*, 478 U.S. at 400.

Finally, UO argues that men as well as women are affected by retention raises. That argument simply shows that retention practices are facially neutral. A disparate impact analysis does not require that the challenged practice *only* affects women; it must affect women *disproportionately* relative to men. *See Garcia v.*

Spun Steak, 998 F.2d 1480, 1486 (9th Cir. 1993). Defendants' data shows that it does.

C. Plaintiff Identified a Specific, Neutral Practice.

UO argues that the neutral practice identified by Plaintiff is not "suitable for an impact analysis" because retention decisions are individualized and subjective. Ans. Br. at 47. The law is well-settled, however, that subjective, individualized practices can be the subject of disparate impact claims. *See Watson*, 487 U.S. at 978 ("disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests"); *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1424–25 (9th Cir. 1990). Further, Plaintiff has been consistent in her position that she does not challenge retention offers *per se*. She has consistently agreed that some retentions are necessary. Rather, what she challenges is the department's process in granting them, which fails to correct for disparities between faculty of comparable merit and seniority that they create.

D. UO Fails to Show That The Challenged Practice is Job-Related.

UO argues that its practice of granting retention raises is job-related because its process involves considering multiple indicia of the individual's performance. This argument does not address the specific element of the practice that Plaintiff has identified: UO's failure to consider and rectify the salary disparities within the

Department that retentions create. UO makes no effort to show that this component of its practice is job-related.

Further, if the detailed evaluation that goes into considering a retention raise is job-related, then why does UO refuse to do such an evaluation for all comparable professors in the department? UO claims on the one hand that the process is job-related because it measures job performance, yet it argues on the other hand that doing the same analysis for comparable faculty is not feasible. UO's *refusal* to undertake the same evaluation and salary adjustment for comparable faculty is the very opposite of a legitimate measure of "important elements of work behavior which comprise or are relevant to the job." *Contreras v. City of Los Angeles,* 656 F.2d 1276, 1279 (9th Cir. 1981)(defining job-related).

E. Plaintiff Showed an Alternative Practice.

Defendants distort the viable, alternative practice that Plaintiff offers. What she proposes is a system contemplated by UO policy that was in effect for many years: adjusting the salaries of comparable faculty in the same department as part of granting a retention raise. Plaintiff does not suggest (and never did) that a faculty member be "met halfway" or that available funds be split in any particular way.[6]

[6] Defendants cite Plaintiff's deposition to argue that she offered no viable alternative. Ans. Br. at 16. But it was not up to Plaintiff to articulate at deposition – before any party had a fully-developed factual record – the details of an alternative

The fact that the method described by former Interim President Coltrane was used for many years indicates that it was financially workable for UO. ER-154. The Psychology Department "would expect much less retention activity and turnover in the department if there were alternative ways of arriving at merit-adequate salaries." ER-126. With less retention activity and turnover in the department, it is likely that the overall cost to UO could be less than what it sees under its current practice, which effectively encourages faculty to seek outside offers.

Returning to that prior system would not impose additional administrative burdens because the Department already conducts comparative evaluations of faculty in distributing equity raises: it considers who is below the regression line, together with a detailed assessment of merit, to determine whether an equity raise is appropriate. ER-87. The Department's policy on retention raises already endorses seeking additional money for affected faculty when retention raises create inequities. ER-180. The self-study also recommends the practice. ER-130.

IV. Defendants' Shifting Explanation of UO Policy, And Other Evidence Showing It Favors Men, Show Pretext.

Plaintiff's claims under Title VII, Title IX, and ORS 659A.030 need not follow the "equal work" standards of the EPA. *See Gunther*, 452 U.S. at 181

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practice that would meet the requirements of Title VII. That is a task for her lawyers and experts on a fully developed record.

(holding that respondents' Title VII claims of discriminatory undercompensation did not require a showing of equal work to male comparators); *see also Lenzi v. Systemax, Inc.*, No. 18-979, __ F.3d __, 2019 WL 6646630, at *1 (2d Cir. Dec. 6, 2019) ("to establish a prima facie pay discrimination claim under Title VII, a plaintiff need not first establish an Equal Pay Act violation—that is, that she performed equal work but received unequal pay."). Freyd's disparate treatment claim does not require a showing of substantially equal work, but it does require a showing of intentional discrimination. *Spaulding*, 740 F.2d at 701.

Substantial record evidence gives rise to an inference of intentional discrimination. Statistical differences in pay rates alone permit an inference of discrimination. *Lenzi*, 2019 WL 6646630, at *7. UO attempts to defeat Freyd's evidence with a grab bag of other evidence that it says "point[s] away" from discrimination. This merely underscores the "divergent ultimate inferences" that could be drawn in this case, making summary judgment improper. *Fresno Motors v. Mercedes Benz USA*, 771 F.3d 1119, 1125 (9th Cir. 2014). UO's repeated suggestion that a welcoming job offer to Freyd in 1987 somehow negates its discriminatory treatment of her thirty years later shows how far it has to reach in an effort to overcome the inference of discrimination.

The only explanation UO offers for denying Freyd a raise appears in Defendant Sadofsky's declaration. Sadofsky starts by comparing Freyd's salary

with those in her department at other AAU schools and internally at UO. SER-95-96. In claiming that Freyd's pay compares favorably with others' in these pools, he takes no account of Freyd's seniority. *Id*. This omission violates UO policy as Sadofsky himself described it in a 2016 email: "policy and practice we have established since the 2013 CBA" considers raises of up to 12% "if there is a strong case that this is necessary to address equity issues with faculty of comparable merit *and time-in-rank* within the department or relative to AAU average salaries in the discipline." ER-119 (emphasis added). Considering time in rank changes Sadofsky's comparisons substantially to show that Freyd is underpaid relative to her peers.[7] ER-146-47.

Sadofsky repeats his omission of seniority when he describes UO policy for the 12% raise. He claims that the policy is to look for triggering criteria

> that either the faculty member is paid significantly less than the average full professor in their department with no good explanation, or that the faculty member is paid significantly less than the average full professor in the discipline within the AAU public universities with no good explanation.

SER 105-06. Yet his 2016 email to Freyd and Dean Marcus quoted above, describing the *same* policy, explicitly *includes* time-in-rank. ER-119. Sadofsky

[7] Sadofsky uses another professor's seniority and distinguished record as a reason that person makes more than Freyd (SER-96), yet chooses not to take her seniority or her distinguished record into account when comparing her to others.

knew that considering time-in-rank showed Freyd to be underpaid, because Mayr's memo to him requesting a raise for Freyd graphically represented the disparities. ER-146-47.

Sadofsky's omission of a key policy consideration that would trigger an equity raise for Freyd is evidence of pretext. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 147 (2000) ("it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation.").

Sadofsky cherry picks moments in time to claim that if Freyd had brought up her salary in other years (which she did), the picture would look different. SER-103. These selective snapshots ignore the Department's own overarching data that covers the entire period from 2007 through 2017 and shows statistically significant gaps between male and female salaries, consistent over time no matter who was in the department. ER-103-04, 129-30.

Sadofsky points to a retention raise given to Jennifer Pfeiffer in 2018 as if that shows lack of bias. SER-103. He fails to mention that Pfeiffer's close collaborator and colleague, Eliot Berkman, promoted from associate to full professor at the same time as Pfeiffer, received a larger retention raise over the objections of the department head. ER-270. The UO Provost "mandated" a "significant preemptive salary raise and substantial research funds" for Berkman. *Id*. The Department Head disagreed and advocated instead for an amount "that

would have been more equitable" with the amount extended to Pfeiffer. *Id*. The Provost declined an equitable raise and Berkman received more than Pfeiffer. *Id*. When viewed in full context, the evidence that UO selectively advances actually shows its continued better treatment of men.

Finally, UO complains that Freyd's evidence of how UO has treated other women seeking a raise "do not even involve Plaintiff." Ans. Br. at 35. But for decades the U.S. Supreme Court has recognized an employer's "general policy and practice with respect to minority employment" as among the types of evidence that are relevant to a showing of pretext. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804–05 (1973).

"When a court too readily grants summary judgment, it runs the risk of providing a protective shield for discriminatory behavior that our society has determined must be extirpated." *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1112 (9th Cir. 2004). Plaintiff's substantial evidence of pretext supports an inference of discrimination and should have barred summary judgment on her disparate treatment claims.

V. Defendants' Motion to Strike Should Be Denied.

UO moves this Court to strike a declaration from Professor Allen, various citations to outside sources, and evidence that the court declined to strike below. This motion should be denied.

The lower court considered the Allen declaration and ruled on it in declining Plaintiff's request for relief from judgment. ECF 114. It is therefore properly in the record on review.

Referring to outside sources like social science articles or a statistics textbook is not presenting new evidence and is not barred on appeal. All of Plaintiff's references support arguments that she made below.

Finally, UO did not appeal the lower court's admission of Plaintiff's evidence. That evidence is in the record and it is not the role of this reviewing body to strike it.

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CONCLUSION

For the foregoing reasons, the district court's decision should be reversed.

DATED this 13th day of December, 2019.

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